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No. 94-2026

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in fashioning a class-wide back-pay remedy for petitioner's discriminatory operation of its hiring halls.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 4a-17a) and the decision of the administrative law judge (Pet. App. 18a-82a) are reported at 311 N.L.R.B. 1368.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1995. A petition for rehearing was denied on March 14, 1995. Pet. App. 83a-84a. The petition for a writ of certiorari was filed on June 12, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (Union), represents employees working in the roofing trades in the Philadelphia, Pennsylvania metropolitan area. Pet. App. 20a. While the Union actually consists of two "sides," known as "Local 30" and "Local 30B," both sides constitute a single labor organization for purposes of the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* Pet. App. 21a. The Union operates a number of hiring halls within its geographic jurisdiction; however, the Union treats each hiring hall as though it were two different halls, one "side" for use by members of Local 30, and the other "side" for use by members of Local 30B. *Ibid.*

All of the hiring halls used by members of Local 30 were exclusive hiring halls by virtue of a labor contract between the Union and an employer association known as the Roofing & Sheet Metal Contractors Association of Philadelphia and Vicinity (RSMCA), whose members were engaged exclusively in the installation of commercial roofs. Pet. App. 21a, 26a. The Union enforced a blanket policy of prohibiting members of Local 30B from seeking employment referrals through the Local 30 "side" of the Union's hiring halls. *Id.* at 23a. As a result, members of Local 30B were unable to obtain referrals to commercial roofing jobs covered by the RSMCA contract. Such commercial roofing jobs paid substantially more in wages and benefits than jobs covered by a separate labor contract between Local 30B and another roofing

contractors association known as the Roofing, Metal & Heating Associates (RMHA). *Id.* at 22a & n.3, 23a.

Before June 1989, no member of Local 30B had ever attempted to challenge the Union's policy of refusing to allow members of Local 30B to seek referrals from the Local 30 hiring halls. However, on June 19, 1989, Local 30B member David Suda, with what the administrative law judge (ALJ) described as "stunning courage," walked into the Local 30 hiring hall in Philadelphia and asked the dispatcher, Thomas Hamilton, to allow him to sign the work list. Pet. App. 38a-39a, 43a. Hamilton initially refused, telling Suda to "use the [Local] 30B hall." *Id.* at 43a.[1] When Suda insisted, Hamilton allowed him to sign the work list, but told him that he would not be referred to a job from the Local 30 hiring hall. *Ibid.* Hamilton never asked Suda about his job qualifications or work history. *Ibid.* About thirty minutes later, while Suda was sitting quietly waiting for a referral, the Union's business agent approached Suda, and, in an expletive-filled shout, ordered him to get out of the Local 30 hiring hall and "go back to 30B where you belong." *Id.* at 43a-44a. A skirmish ensued, during which the business agent punched Suda in the jaw. *Id.* at 44a. Suda was then physically ejected from the hiring hall by the business agent and the Union's vice-president. *Ibid.*

2. a. Suda filed unfair labor practice charges against the Union. In February 1991, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that the Union violated the Act by conditioning job re-

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[1] In Philadelphia, the Local 30 and Local 30B hiring halls are located in different buildings. Pet. App. 21a.

ferrals from the Local 30 hiring halls upon the employees' membership status within the Union. Pet. App. 19a, 57a n.19.

After a hearing, the ALJ concluded that the Union violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by preventing Suda and other members of Local 30B from obtaining referrals from Local 30 hiring halls because of their membership in Local 30B. Pet. App. 62a.[2] The ALJ found that "the record is utterly clear that [the Union's] sole reason for refusing Suda access to Local 30 jobs * * * was that Suda is a member of the Union's 30B side rather than its Local 30 side." *Id.* at 46a. The ALJ further found that "the record is clear that the Union's sole basis for refusing to let [Local] 30B members use the Local 30 hiring halls is their membership in [Local] 30B rather than Local 30." *Id.* at 23a. The Union's conduct was unlawful, the ALJ explained, because, under settled law, "[l]ack of membership in a favored union is not an appropriate basis for refusing access to an exclusive hiring hall. * * * Nor may a [u]nion operate a hiring hall in a way that favors one faction of its members over another." *Id.* at 23a-24a.

The ALJ rejected petitioner's contention that its exclusionary policy was lawful because most members of Local 30B were not qualified to perform the

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[2] The ALJ also found that the Union violated Section 8(b)(1)(A) by informing Suda and members of Local 30B that they were not permitted to seek job referrals from Local 30 hiring halls solely because they were members of Local 30B and not Local 30; by assaulting Suda because he sought a job referral from a Local 30 hiring hall; and by imposing a fine on Suda as a result of the altercation at the Local 30 hiring hall; and violated Section 8(b)(1)(A) and (2) by causing an employer to discharge Suda. Pet. App. 62a-63a.

kinds of jobs available through Local 30 hiring halls. Pet. App. 24a. Rather, the ALJ found that, although "[i]t is evident * * * that some substantial number of [Local] 30B members are competent commercial roofers" (*id.* at 36a), "[t]he Union treats as beside the point the [Local] 30B members' qualifications * * *. No matter how well qualified, [Local] 30B members are not permitted to seek work through the Local 30 halls." *Id.* at 23a.[3]

Furthermore, the ALJ found that, although Suda was the first member of Local 30B to attempt to obtain a referral from a Local 30 hiring hall, it was "obvious" that other "[Local] 30B members qualified for Local 30 work would have applied for work at the Local 30 halls had the Union not communicated the message that the Local 30 halls were off-limits to [Local] 30B members." Pet. App. 39a. The ALJ added that "[i]t is altogether unlikely that [the Suda] episode went unnoticed among the [Local] 30B membership, and it alone would explain the absence of [Local] 30B members in the Local 30 hiring halls since June 1989." *Id.* at 40a.

The ALJ also found it significant that, in a prior civil RICO suit brought by the United States against the Union, a federal district court found that, over the 20-year period ending in 1987, the Union and its agents, on numerous occasions, had firebombed the

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[3] Given the ALJ's findings, the Union mischaracterizes the Board's decision in asserting (Pet. 13) that "[t]he Board's Decision clearly determines that the alleged discrimination against Suda was not based on Suda's membership in Local 30B," but rather "was based on the Union's refusal to refer Suda to work * * * notwithstanding his demonstrated qualifications for employment." See also Pet. 20.

property of disfavored roofing contractors, savagely beat individuals associated with those contractors, and engaged in intimidation of its own members. Pet. App. 40a-41a; see *United States* v. *Local 30, United Slate, Tile & Composition Roofers*, 686 F. Supp. 1139 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989). In particular, the ALJ pointed out that the district court found that "many members of the Union * * * fear * * * that if they go to the Union Hall to resolve a dispute or problem * * * they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten." Pet. App. 42a.

In light of "the Union's past predilection for using axes, monkey wrenches and the like on persons who did not heed the wishes of the Union's officers," "the close relationship between many of the current officers of the Union and the persons whom [the court] found to have so violently violated the law," and "the Union's message to the effect that [Local] 30B members are not to use the Local 30 halls," the ALJ concluded that "it is no surprise—to say the least—that [Local] 30B members have stayed away from the Local 30 halls." Pet. App. 43a. The ALJ also noted that the court had imposed a "decreeship" on the Union, and had appointed a court liaison officer to monitor the terms of the decree. *Id.* at 61a.

b. The ALJ found that "the extraordinary facts of this case demand equally extraordinary remedial action by the Board," for "[i]t is clear that drastic steps are needed to remedy the many years of hiring hall discrimination practiced by the Union, particularly in view of the Union's history of violence." Pet. App. 64a-65a. The ALJ explained that the scope of the remedy "hinges on the extent to which [Local]

30B members are qualified for commercial work," since "the business of the RSMCA's members is entirely the installation of flat commercial roofs." *Id.* at 25a, 26a. The testimony of Suda and other witnesses established that Suda was "an expert commercial roofer." *Id.* at 46a. However, the ALJ found that the Union maintained no objective standards for determining whether a member of Local 30 who applied for a referral from a Local 30 hiring hall was actually qualified to do commercial roofing work. *Id.* at 55a-57a.[4]

To fashion an appropriate qualification standard for commercial roofing work, the ALJ examined the testimony of roofing contractors and relevant employment records. Pet. App. 32a-36a, 69a-70a. Based on that evidence, the ALJ found that a member of Local 30B should be deemed to have been qualified to per-

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[4] The ALJ found that the Union's failure to maintain objective standards for determining eligibility for referral from Local 30 hiring halls constituted an independent violation of Section 8(b)(1)(A) and (2) of the Act. Pet. App. 57a. In so concluding, the ALJ noted that a rule instituted by the Union in December 1988, "whereby a roofer must have 5,000 hours of commercial roofing experience in order to be admitted to Local 30 membership" (*id.* at 29a-30a), was "a standard for qualifying for membership * * * not for referral from Local 30 halls" (*id.* at 56a). The ALJ rejected the Union's proposal that the Board adopt its 5,000-hour rule as a referral standard; the ALJ found that the manner in which the Union proposed to apply that standard to Local 30B members "would hardly be objective" and was "obviously discriminatory." *Id.* at 56a, 66a. Given the ALJ's findings, the Union mischaracterizes the Board's decision in asserting (Pet. 13-14) that "the Board found that the Union's established criteria for determining commercial journeyman status * * * was [*sic*] lawful." See also Pet. 15.

form commercial roofing work if, at the time of the claimed loss of referral, that member: (1) was a graduate of Local 30B's apprenticeship program and possessed at least 5,000 hours of roofing experience; (2) possessed a total of at least 5,000 hours of roofing experience with one or more specified RMHA contractors, with any RSMCA contractor, or with any other contractor whose commercial roofing work constituted more than half of its total roofing work; or (3) possessed at least 5,000 hours of commercial roofing experience. *Id.* at 69a.[5]

Accordingly, the ALJ ordered the Union, *inter alia*, to make all members of Local 30B who met the foregoing standard (including Suda) whole for any loss of earnings and benefits they may have suffered because of the Union's discriminatory operation of the Local 30 hiring halls, beginning September 20, 1988 (the date six months prior to the date on which Suda filed his unfair labor practice charge). Pet. App. 68a-69a.

3. The Board affirmed the ALJ's findings and conclusions and, modifying the remedial class to include individuals known as "helpers," who were also victims of the Union's discriminatory operation of the Local 30 hiring halls, the Board adopted the ALJ's remedial order. Pet. App. 4a-17a.[6]

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[5] In light of the evidence relied upon by the ALJ, the Union is incorrect in asserting (Pet. 13) that the Board's order is based on "the Board's own subjective criteria for qualification as a commercial journeyman."

[6] "Helpers" are individuals who worked under the Local 30B/RHMA labor contract and paid "field dues," but were not full members of Local 30B. Pet. App. 6a.

4. The court of appeals summarily enforced the Board's order. Pet. App. 1a-3a.

ARGUMENT

The Board correctly found that petitioner committed a "blatant and wholesale" violation of the Act (Pet. App. 63a) by discriminatorily prohibiting the members of Local 30B and the helpers, as a class, from seeking job referrals from Local 30 hiring halls, solely because of their lack of membership in Local 30. Accordingly, the Board also acted within its remedial discretion in ordering petitioner to make whole the class members for any loss of earnings and benefits they may have suffered on account of petitioner's unlawful discrimination. Since job referrals available through Local 30 hiring halls required skilled commercial roofers, the Board acted within its remedial discretion in identifying a reasonable commercial roofing job-qualification standard to guide the Board's determinations of which individuals in the remedial class are entitled to backpay. Because the Board's remedial views "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), the court of appeals correctly enforced the Board's order. Further review by this Court is therefore not warranted.

1. Petitioner does not challenge the Board's remedial policy (see Pet. 9), nor does it contest the Board's order to the extent that it requires petitioner to make whole discriminatee Suda. Rather, petitioner asserts (Pet. 8-14) that the Board abused its discretion insofar as it extended a backpay remedy to any other member of Local 30B. There is no merit to that contention. In *Heavy & Highway Construction Workers' Local Union No. 158 (Contractors' Ass'n of*

Eastern Pennsylvania), 280 N.L.R.B. 1100, 1101 (1986), enforced mem., 865 F.2d 251 (3d Cir. 1988) (Table), the Board explained that, in cases involving the unlawful operation of an exclusive hiring hall, it is the Board's established policy "to order[] remedial relief to unnamed individuals similarly situated to discriminatees" where, as here, the Board finds that there is "sufficient evidence to establish widespread discrimination against a defined and easily identified class." As the Board noted, "[c]ommon to these cases is the fact that unnamed discriminatees [can] be easily identified by a single, readily ascertainable, and definitive trait, most often the absence of membership in a particular labor organization." *Ibid.*[7]

Petitioner argues (Pet. 10) that the Board should not have granted a remedy to the unnamed members of Local 30B since they do not share a "single, readily ascertainable, and definitive trait" with discriminatee Suda under *Heavy & Highway Construction Workers' Local 158*, *supra*. Although Suda and the unnamed individuals were all members of Local 30B, petitioner contends (Pet. 10) that "the Board did not rely on such status, alone, as a basis for back pay liability. Rather, the Board established a class predicated upon various permutations of experience."

Petitioner, however, mischaracterizes the Board's decision. The Board found that petitioner violated the Act by prohibiting Suda and his fellow members of Local 30B from seeking job referrals through Local

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[7] See, *e.g.*, *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 45*, 232 N.L.R.B. 520, 521 (1977); *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 235 N.L.R.B. 1511, 1514 (1978), enforced mem., 598 F.2d 611 (3d Cir. 1979) (Table).

30 hiring halls because they were not members of Local 30, and for no other reason. Pet. App. 62a. Accordingly, it was proper for the Board to extend remedial relief to the class of unnamed members of Local 30B, for they, like Suda, suffered discrimination solely on account of their shared "absence of membership in a particular labor organization." *Heavy & Highway Construction Workers' Local 158*, 280 N.L.R.B. at 1101. The commercial roofing job-qualification standard fashioned by the Board is irrelevant to defining the class of discriminatees; rather, that standard bears only upon the identification of those members of that class who are actually entitled to an award of backpay, an issue to be resolved in a future compliance proceeding. See *International Brotherhood of Boilermakers, Local 101 (Stearns-Rogers Corp.)*, 206 N.L.R.B. 30, 30 n.3, 40-41 (1973); *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433 (The Associated General Contractors of California, Inc.)*, 228 N.L.R.B. 1420, 1440-1441 (1977), enforced, 600 F.2d 770 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980).

Second, petitioner argues (Pet. 10-12) that, because "[t]here is a substantial lack of evidence that the Union discriminated against any person other than Suda," the Board was required by its precedents to limit any relief in this case to Suda alone. The facts as found by the Board and sustained by the court of appeals, however, reflect discrimination against the class. Petitioner "communicated the message that the Local 30 halls were off-limits to [Local] 30B members" (Pet. App. 39a); it reinforced that message by physically ejecting Suda from the Local 30 hall in Philadelphia when he attempted to challenge petitioner's unlawful policy (*id.* at 43a-47a); and it

instilled in the members of Local 30B "[the] fear * * * that if they go to the Union Hall * * * they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten" (*id.* at 42a). See discussion at pp. 5-6, *supra*. The fact-bound (and not very plausible) assertion that Suda was the only victim of petitioner's unfair labor practices raises no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Third, petitioner contends (Pet. 12), incorrectly, that, under Board precedent, "[t]he *sine qua non* for imposing any liability beyond Suda * * * should have been an attempt by other Local 30B members to seek referral from Local 30, coupled with specific evidence of their qualification for such referral." Under the NLRA, victims of discriminatory hiring hall practices are not required to engage in futile acts in order to preserve their entitlement to a remedy for the union's unlawful conduct. See *Teamsters Local Union No. 293 (Beverage Distributors, Inc.)*, 302 N.L.R.B. 403, 407 (1991), enforced, 959 F.2d 236 (6th Cir. 1992) (Table); *Local Union 948, International Brotherhood of Electrical Workers*, 253 N.L.R.B. 656, 658 (1980), enforced, 697 F.2d 113 (6th Cir. 1982). The ALJ found (Pet. App. 39a) that "[Local] 30B members qualified for Local 30 work would have applied for work at the Local 30 halls had the Union not communicated the message that the Local 30 halls were off-limits to [Local] 30B members." Suda's experience confirmed that any effort by a Local 30B member to obtain a job referral or to demonstrate his or her job qualifications at a Local 30 hall would have been pointless, and perhaps even dangerous. Pet. App. 23a, 43a-47a. Class members were not legally

required to engage in such futile acts in order to be eligible for relief.

2. Petitioner also contends (Pet. 18) that the Board's remedial order is punitive and "could render the Union bankrupt," and that it therefore fails to effectuate the purposes of the Act. Until the Board has completed compliance proceedings to determine which members, if any, in the remedial class are entitled to backpay and how much is due them, petitioner's claim of financial hardship is both speculative and premature. See *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 760 n.37 (7th Cir. 1989); *NLRB* v. *International Longshoremen's & Warehousemen's Union, Local No. 13*, 549 F.2d 1346, 1355 (9th Cir.), cert. denied, 434 U.S. 922 (1977).[8]

3. Finally, petitioner contends (Pet. 21) that the Board violated "fundamental concepts of due process" because, it asserts, the Board failed during the hearing process to "announce that it would consider a 'class' type remedy * * * or in any manner alert [the Union] to the potential scope of the remedy it was considering, until *after* the Board's Decision was issued." See also Pet. 22-23. Petitioner did not raise that claim below, and therefore waived it. *Neely* v.

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[8] The Union further suggests (Pet. 21-22) that, under the Board's procedural rules that govern compliance proceedings, the Union will be unable to offer, and the Board will not consider, evidence that "the Board's remedy may financially destroy the Union." That claim is meritless, for the Board has made clear that a party "has an opportunity to show current hardship as cause for modification of the remedy at the compliance stage." *Coronet Foods, Inc.* v. *NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993).

Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967).

In any event, petitioner's claim is based on a mischaracterization of the record. In the unfair labor practice complaint, the General Counsel put petitioner on notice that he was seeking "an Order requiring the Respondent Union to, *inter alia*, * * * make whole David Suda *and all employee-members of Local 30B [who] have experience in performing commercial roofing work*." 1 C.A. App. 1016 (emphasis added). The General Counsel pressed his request for class-wide relief before the ALJ (Pet. App. 68a) who, after a hearing and the submission of briefs by all parties, ordered a remedy for the class (*id.* at 69a-70a). Although petitioner's exceptions to the ALJ's order included an objection to its class-wide scope, the Board rejected that objection and adopted the ALJ's order in all relevant respects. The record thus shows that the Board afforded petitioner full notice and the opportunity to be heard with respect to the scope of the remedy in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995